88-648

Supreme Court, U.S.
FILED
SEP 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88- _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROGER ENDELL, Commissioner,
Alaska Department of Corrections,

Petitioner,

versus

SCOTT A. WALKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GRACE BERG SCHAIBLE
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: DAVID MANNHEIMER
Asst. Attorney General

Office of Special Prosecutions and Appeals
1031 West Fourth Avenue,
Suite 318
Anchorage, Alaska 99501
(907) 279-7424

QUESTION PRESENTED

Normally, when a state prisoner seeks federal habeas corpus relief on a claim that was not preserved in the state trial court, he must show good cause for failing to raise his claim in the trial court and resulting prejudice to the fairness of his trial before a federal court may reach the merits of his claim. Wainwright v Sykes, 433 U.S. 72 (1977). Does the fact that the state appeals court examines the prisoner's claim for "plain error" or "manifest injustice" allow a federal court to reach the merits of the prisoner's claim even though he has not satisfied the requirements of Wainwright v Sykes?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	2
Jurisdiction	3
Statutory Provisions Involved . .	3
Statement of the Case	4
Reasons for Granting the Writ . .	10
1. The Decision of the Ninth Circuit Conflicts with Decisions of the First, Sixth, and Seventh Circuits Concerning the Application of Wainwright v Sykes when a State Appellate Court Reviews an Unpreserved Claim for Plain Error . . .	11
2. The Ninth Circuit Has Offered a Poor Solution to a Significant and Recurring Problem in the Relation Between the Federal and State Judiciaries	16
Conclusion	25
Appendix . . . . . (Opinions Below)	App. 1

TABLE OF AUTHORITIES

Page

Cases

County Court of Ulster County v Allen, 442 U.S. 140 (1979) . 8,11

Davis v Allsbrooks, 778 F.2d 168 (4th Cir. 1985) 17-18

Dimmick v State, 449 P.2d 774 (Alaska 1969) 11

Gardner v Ponte, 817 F.2d 183 (1st Cir. 1987), cert den 107 S.Ct. 181 . . 12

Hockenberry v Sowders, 620 F.2d 111 (6th Cir. 1980), cert den 450 U.S. 933 . . . 13

Marrone v State, 653 P.2d 672 (Alaska App. 1982) 11

McBee v Grant, 763 F.2d 811 (6th Cir. 1985) 14

McCown v Callahan, 726 F.2d 1 (1st Cir. 1984), cert den 469 U.S. 839 . . . 12,16

Phillips v Lane, 787 F.2d 208 (7th Cir. 1986), cert den 107 S.Ct. 249 . . 12-13
15

Page

Potts v State, 712 P.2d 183
(Alaska App. 1985) 11

Puleio v Vose, 830 F.2d 1197
(1st Cir. 1987) 12

United States ex rel. Caruso v
Zelinsky, 689 F.2d 435
(3rd Cir. 1982) 17

United States ex rel. Huckstead v
Greer, 737 F.2d 673
(7th Cir. 1984) 13

United States ex rel. Merneigh v
Greer, 772 F.2d 322
(7th Cir. 1985) 13

Wainwright v Sykes, 433 U.S. 72
(1977) 3,9
10 & passim

Walker v Endell, 850 F.2d 470
(9th Cir. 1987) 8,13

Walker v State, 674 P.2d 825
(Alaska App. 1983) 6-7

Statutes/Rules

Alaska Criminal Rule 47(b) . . . 3,6
18

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROGER ENDELL, Commissioner,
Alaska Department of Corrections,

Petitioner,

versus

SCOTT A. WALKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Roger Endell, Commissioner of Corrections for the State of Alaska, asks this Court to issue a writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on June 27, 1988.

Opinions Below

The amended opinion of the Ninth Circuit is reproduced in the appendix to this petition; it is also reported at 850 F.2d 470. The opinion of the U.S. District Court as well as the report and recommendation of the U.S. Magistrate which the District Court adopted are also reproduced in the appendix.

The opinion of the Alaska court of appeals is reported at 674 P.2d 825. No opinion was issued by the Alaska supreme court.

JURISDICTION

This case involves a habeas corpus action filed by the respondent, Scott A. Walker. The amended opinion of the Ninth Circuit (affirming the district court's denial of the writ) was issued on June 27, 1988. This petition for certiorari is submitted within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

The text of Alaska's "plain error" rule, Alaska Criminal Rule 47(b), is found on pages 6-7 of this petition.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

Scott Walker was convicted in the Alaska superior court in Anchorage of kidnapping, robbery, burglary, and theft. He appealed his kidnapping and robbery convictions to the Alaska court of appeals. One of the issues Walker raised on appeal was a complaint that the trial judge had misinstructed the jury:

Walker's defense at trial was "duress"; he claimed that he had been coerced into participating in the kidnappings and the robbery. Under Alaska law, AS 11.81.440(a), "duress" is established if the defendant proves that he:

> ... engaged in the proscribed conduct because [he] was coerced to do so by the use of unlawful force upon the defendant or a third person, which force a reasonable

> person in the defendant's situation would have been unable to resist.

However, subsection (b) of this same statute limits the scope of the duress defense:

> The defense of duress is not available when one recklessly places oneself in a situation in which it is probable that one will be subject to duress.

At Walker's trial, the judge instructed the jury on duress using the statutory language of AS 11.81.440(a) and (b), quoted above.

Walker did not ask the trial judge to give the jury any definition of the term "recklessly", even though there is a statutory definition of that term; see AS 11.81.900(a)(3). But on appeal to the Alaska court of appeals, Walker sought reversal of his convictions by claiming that the trial judge should have

given a specific jury instruction on the meaning of the word "recklessly".

B. The Decision of the Alaska Court of Appeals

In the Alaska court of appeals, Walker conceded that his attorney had not asked the trial judge to give the jury a more specific definition of "recklessly". However, he argued that he was entitled to relief because the failure to define "recklessly" constituted "plain error".

Alaska Criminal Rule 47(b), which is worded identically to Federal Criminal Rule 52(b), allows an appellate court to grant relief on issues that were not properly preserved in the trial court if the defendant can show "plain error":

> Plain errors or defects affecting substantial rights may be noticed although they were not

> brought to the attention of the [trial] court.

But the Alaska court of appeals found that Walker had failed to establish plain error:

> We are to find plain error only "where necessary to prevent a miscarriage of justice". Dimmick v State, 449 P.2d 774, 776 (Alaska 1969). We have previously concluded that a trial court's failure to define the term "recklessly" was not plain error in Williams v State, 648 P.2d 603, 608 (Alaska App. 1982). We said:
>
> > "The meaning of 'recklessly' is well within the comprehension of the average juror and the code definition appears to be a common sense definition of the term. We do not find that the failure to define the term 'recklessly' constituted plain error."
>
> We see no reason to depart from that holding. We find no error.

Walker v State, 674 P.2d 825 at 829-830 (Alaska App. 1983).

C. Habeas Corpus Proceedings in the Federal District Court

Following the Alaska court of appeals's affirmance of Walker's convictions, and following the Alaska supreme court's denial of Walker's petition for hearing (discretionary review), Walker sought federal habeas corpus relief.

The case was initially heard by a federal magistrate, who issued a written report to the district court. The magistrate, noting that Walker's claim had not been presented to the state trial court, recommended that Walker's claim be denied because Walker had not satisfied (in fact, had made no attempt to satisfy) the "cause and prejudice" standard of Wainwright v Sykes. Appendix, pp. 77-83.

The magistrate recognized that, under County Court of Ulster County v

Allen, 442 U.S. 140 (1979), the "cause and prejudice" requirement need not be met when the state court overlooks the procedural default and decides the merits of a petitioner's claim. However, the magistrate concluded that the Alaska court of appeals, by reviewing Walker's claim only for "plain error", had not overlooked Walker's procedural default.

District Judge James M. Fitzgerald adopted the magistrate's recommendation and denied habeas corpus relief. Appendix, pp. 33-36. Walker then appealed to the Ninth Circuit.

D. The Decision of the Ninth Circuit

The Ninth Circuit affirmed the district court's denial of habeas corpus relief. Walker v Endell, 850 F.2d 470

(9th Cir. 1987). However, the Ninth Circuit did so only after reaching the merits of Walker's jury instruction claim and rejecting it. Appendix, pp. 21-26; 850 F.2d at 475-476.

Reversing the district court's ruling that Walker had to satisfy the "cause" and "prejudice" requirements of Wainwright v Sykes, the Ninth Circuit held that a state prisoner seeking federal habeas corpus relief need not comply with Wainwright v Sykes if the state appeals court has undertaken a "plain error" review of the prisoner's claim. Appendix, pp. 13-19; 850 F.2d at 473-474.

The State of Alaska asks this Court to reverse this ruling of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

1
The Decision of the Ninth Circuit Conflicts with Decisions of the First, Sixth, and Seventh Circuits Concerning the Application of Wainwright v Sykes when a State Appellate Court Reviews an Unpreserved Claim for Plain Error

This Court has held that when a state prisoner seeks federal habeas corpus relief based on a claim that was not preserved in the state trial court, the federal courts are precluded from considering the merits of the prisoner's claim unless he can show (1) that he had good cause for failing to raise the issue at trial and (2) that he was substantially prejudiced by the asserted error. Wainwright v Sykes, 433 U.S. 72 (1977).

On the other hand, this Court has held that when a state appeals court

overlooks the prisoner's procedural default and reaches the merits of his claim, the federal courts can likewise examine the merits of the claim without regard to the procedural default; the prisoner need not demonstrate "cause" and "prejudice". County Court of Ulster County v Allen, 442 U.S. 140 (1979).

In this case, Walker conceded that his jury instruction claim had not been raised in the state trial court, but he nevertheless sought state appellate relief under Alaska's "plain error" rule. The Alaska court of appeals reviewed Walker's claim for plain error and found none. 1/

1/ In Alaska, a defendant arguing

(Footnote continued on next page)

The Ninth Circuit has ruled that, once a state appeals court reviews an unpreserved claim for plain error, a state prisoner need no longer meet the "cause" and "prejudice" requirements of Wainwright v Sykes. But three other circuits disagree.

In McCown v Callahan, 726 F.2d 1 (1st Cir. 1984), cert den 469 U.S. 839, the First Circuit confronted the similar

---

(Footnote continued page)

"plain error" on appeal must show not only that error occurred, but also that (1) the error should have been obvious to any competent judge or lawyer, and (2) the error caused manifest injustice by substantially prejudicing the fairness of the defendant's trial. Dimmick v State, 449 P.2d 774 at 776 (Alaska 1969); Marrone v State, 653 P.2d 672 at 675-681 (Alaska App. 1982); Potts v State, 712 P.2d 183, n.11 at 394 (Alaska App. 1985).

Massachusetts rule that the lack of a contemporaneous objection could be overlooked if there was a substantial likelihood that a "miscarriage of justice" had occurred. The First Circuit held that state court review under the "miscarriage of justice" standard did not constitute a waiver of the petitioner's procedural default. 726 F.2d at 2-4.

This analysis of the problem was again employed by the First Circuit in Gardner v Ponte, 817 F.2d 183 (1st Cir. 1987), cert den 108 S.Ct. 181, and in Puleio v Vose, 830 F.2d 1197 at 1200-1201 (1st Cir. 1987).

In Phillips v Lane, 787 F.2d 208 (7th Cir. 1986), cert den 107 S.Ct. 249, the Seventh Circuit declared that it too would treat a state court's review of a petitioner's claim for "plain error" as a

procedural decision for purposes of applying Wainwright v Sykes. The Ninth Circuit, aware of Phillips v Lane, recognized that its decision in this case put it at odds with the Seventh Circuit. Walker v Endell, n.4, 850 F.2d at 474, Appendix, pp. 14-15.

(Twice before, panels of the Seventh Circuit had imposed the "cause and prejudice" requirements of Wainwright v Sykes on a federal habeas petitioner even though the state court had reviewed his claim for "plain error". See United States ex rel. Huckstead v Greer, 737 F.2d 673 at 676-677 (7th Cir. 1984); and United States ex rel. Merneigh v Greer, 772 F.2d 322 at 325-327 (7th Cir. 1985).)

The Sixth Circuit in Hockenberry v Sowders, 620 F.2d 111 at 115-116 (6th Cir. 1980), cert den 450 U.S. 933, held

(alternatively) that a state court does not waive the protection of Wainwright v Sykes even if it undertakes a cursory review of a petitioner's claim for "manifest injustice" (the Kentucky equivalent of plain error). The Hockenberry holding was approved and applied in McBee v Grant, 763 F.2d 811 at 813-814 (6th Cir. 1985).

2

The Ninth Circuit Has Offered a Poor Solution to a Significant and Recurring Problem in the Relation Between the Federal and State Judiciaries

This Court erected the twin procedural barriers of "cause" and "prejudice" in Wainwright v Sykes to preserve federal-state comity: if federal

courts were overwilling to conduct independent review of state prisoners' unpreserved claims, the policies behind the states' contemporaneous objection rules would be undermined. These policies include: (a) a preference for having the trial judge decide legal issues in the first instance, thereby increasing the accuracy of the factual determinations underlying constitutional claims; (b) recognition of the high social cost of holding criminal trials only to have them reversed for errors that might have been easily corrected had the issue been raised in a timely fashion, combined with the possibility that defense attorneys will "sandbag" (i.e., hold claims of error in reserve against the possibility of an unfavorable verdict); and (c) the policy of placing primary emphasis on the

trial itself as the main mechanism for resolving the dispute between the government and the defendant -- of having the trial viewed as the "main event" at which "society's resources [are] concentrated at [one] time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens". Wainwright v Sykes, 433 U.S. at 88-90.

The Ninth Circuit's decision in this case is at odds with the policies enumerated in Wainwright v Sykes. As the Seventh Circuit pointed out in Phillips v Lane, supra, 787 F.2d at 213, if a state court's review of an unpreserved claim for "plain error" is to be treated as a normal decision on the merits, then state prisoners could demand independent federal review of almost any claim their

appellate attorneys could think of, without regard to whether that claim was presented at the defendant's trial.

The Ninth Circuit's decision will also result in the presentation of an increasing number of claims to the federal courts in cases where the state court's published opinion contains only a scanty recitation of the facts and a cursory legal analysis. As pointed out by the First Circuit in McCown v Callahan, supra, a state court reviewing a claim only for plain error

> may not conduct the detailed examination of federal law and federal cases often necessary to decide a specific question of federal law; indeed, it need not do so as long as it determines that a "miscarriage of justice" is unlikely. If federal habeas courts were too ready to find that state "miscarriage of justice" review constitutes "waiver" of the state's procedural rules, the state would

> either have to convert what is often a speedy reviewing task into a full-scale detailed examination of federal law or it would have to abandon "miscarriage of justice" review altogether. ... [This first alternative] conflicts with the theory of Wainwright. That is to say, a state's efforts to stop gross miscarriages of justice should not suddenly force it to grapple with complex federal issues that its procedural rules would otherwise lawfully bar.

McCown v Callahan, 726 F.2d at 3-4.

Moreover, federal courts should not adopt a stance that discourages state courts from examining the merits of a defendant's claim to the limited extent of making sure that manifest injustice is not being perpetrated. As the Third Circuit noted in United States ex rel. Caruso v Zelinsky, 689 F.2d 435 (3rd Cir. 1982):

> Typically, decisions on procedural grounds are not as satisfying as

> decisions on the merits, and it is understandable that a court would want to show that it does not think its reliance on a procedural rule is causing any great injustice.

689 F.2d at 440.

The Fourth Circuit, in Davis v Allsbrooks, 778 F.2d 168 (4th Cir. 1985), echoed this view when it discussed why federal courts should not adopt a rule that totally suppresses state court discussion of the merits of unpreserved claims:

> We would be loathe ... to encourage exclusive reliance upon procedural forfeitures as a means of shielding state convictions from federal collateral attack. Rather, it is desirable to encourage state appellate courts to apply their procedural rules in a way that exhibits an awareness of the [aim of] fundamental fairness of the criminal process.

778 F.2d at 175-176.

The final policy militating

against the Ninth Circuit's decision in this case is that it will likely affect only the way state court opinions are written, without affecting the way state appellate courts conduct their business.

Under Alaska Criminal 47(b) and its counterparts in other states, a state appeals court is obliged to listen when a defendant argues (on appeal) that an asserted error to which the defendant raised no objection at trial amounts to "plain error" or "manifest injustice". Thus, whenever the state court rejects a claim of "plain error", the court has at least implicitly concluded that the defendant has failed to demonstrate obvious error or manifest injustice.

The Ninth Circuit's holding in this case distinguishes between (1) state courts who publicly explain (in print)

why they have concluded that no manifest injustice occurred at the defendant's trial and (2) state courts who keep their reasoning to themselves, issuing opinions that simply note that the defendant failed to preserve an objection at trial.

Under the Ninth Circuit's holding in this case, a state criminal judgement remains cloaked in the procedural protections of Wainwright v Sykes if the state court merely notes that the defendant's claim of error was unpreserved in the trial court and will therefore not be addressed. But if the state appeals court explains in print why it has concluded that no manifest injustice occurred at the defendant's trial, the state court thereby subjects the defendant's claim to independent review by the federal judiciary, waiving the procedural

protection of Wainwright v Sykes.

Under such a rule, state courts will still analyze unpreserved claims; appellate judges will still examine the record to see if obvious injustice has been done. But no discussion of their thought process will appear in the opinion published by the court. This outcome will not benefit society. While it is crucially important that justice be done, it is equally important that the citizens of the states be able to perceive that justice is being done.

CONCLUSION

For these reasons, this Court should issue a writ of certiorari to review the opinion of the Ninth Circuit.

Respectfully submitted this 23rd day of September, 1988.

GRACE BERG SCHAIBLE
ATTORNEY GENERAL OF ALASKA

By: David Mannheimer
David Mannheimer
Assistant Attorney General

APPENDIX

	Pages
Opinion of the Ninth Circuit	1-32
Opinion of the District Court	33-56
Report of the Magistrate	57-102

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT A. WALKER,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 86-4230
v.	)	
	)	
ROGER ENDELL, Director of the Alaska Department of Corrections,	)	D.C. No. CV-84-275-JMF
	)	AMENDED
Respondent-Appellee.	)	OPINION
	)	

Appeal from the
United States District Court
for the District of Alaska
James M. Fitzgerald,
Chief District Judge, Presiding

Argued and Submitted
May 4, 1987 -- Seattle, Washington

Filed September 23, 1987
Amended June 27, 1988

Before: Betty B. Fletcher,
Robert Boochever, and
William A. Norris,
Circuit Judges

FLETCHER, Circuit Judge:

Scott Walker filed this habeas petition claiming that the following errors violated his right to due process: requiring him to prove duress by a preponderance of the evidence; failing to instruct the jury on the meaning of recklessness, proof of which negates the duress defense; and instructing the jury to view "accomplice testimony" with distrust. He also claimed that punishing him cumulatively for robbery and two kidnappings, which arose out of the same transaction, violated the double jeopardy clause; and that sentencing him to a lengthy prison term was the equivalent of sentencing him for murder, a charge of

which he was acquitted, in violation of his fifth and sixth amendment rights. The district court, adopting the recommendation of the magistrate, denied the petition. We affirm.

FACTS

On May 13, 1981, Walker, along with Dale Willhite and Timothy Hopkins, entered the Anchorage home of Mildred Walatka and her son, Herbert Oakley. According to Walker, the group's intent was to steal a coin collection, which Walker knew to be in the residence. Each of the three codefendants was armed. Walker stated that he was surprised when Oakley answered the door, so as prearranged he feigned car problems, planning to leave without further incident. Walker testified that Hopkins then changed the plan and they remained in the house. It was

uncontroverted that while the burglars were in the house, Willhite drew his gun, and ivory and jewelry were taken.

At gunpoint, Walatka and Oakley were then forced into their own car. With Walker driving, the five went to Walatka's bank, where she was forced to remove $600 from her account. Again with Walker at the wheel, the burglars took Walatka and Oakley away from the city, where both were shot to death. Walker assisted in hiding the bodies after the homicides.

At trial, Walker claimed that all of his actions after the feigned telephone call in the Walatka residence were motivated by a fear for his own safety and that of the two victims. He testified that he knew Hopkins had killed an accomplice when he "chickened out" in a prior burglary. Walker further testified that

they were armed only because Hopkins had said a contract had been taken out on their lives. He denied shooting either Oakley or Walatka, and testified that he intended for them to remain unharmed. Willhite, who was granted immunity in return for testimony against Walker, also testified that Hopkins changed the plan by drawing his gun, and that Willhite feared Hopkins.

Walker was tried on charges of theft, burglary, robbery, two counts of kidnapping, and two counts of murder. At trial, he admitted the theft and burglary charges, and was convicted on both. The jury apparently accepted some, but not all of his controverted testimony, because he was found not guilty on either count of murder, but was convicted of robbery and both counts of kidnapping.

Judge Buckalew sentenced Walker to a cumulative term of 89 years in prison. The Alaska Court of Appeals affirmed in a published opinion, Walker v. State, 674 P.2d 825 (Alaska Ct. App. 1983). After the Alaska Supreme Court chose not to exercise its discretionary review, Walker filed this petition for habeas corpus, challenging the kidnapping and robbery convictions.

DISCUSSION

I. Duress

[1] Walker contends that by requiring him to prove duress by a preponderance of the evidence, the trial court and the Alaska statute A.S. 11.81.440(a), impermissibly shifted the burden of proof on intent, in violation of due process. Due process requires that the prosecution

prove every element of a crime beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). If a defense negates an element of the crime, rather than mitigates culpability once guilt is proven, it is unconstitutional to put the burden of proof on the defendant. Takacs v. Engle, 768 F.2d 122, 125 (6th Cir. 1985). The issue, then, is whether proof of duress necessarily entails disproof of the intent elements of the crimes of robbery and kidnapping under Alaska state law.

[2] Walker argues that an element of the crimes of robbery and kidnapping is "criminal intent," and that duress is merely the flip side of this element. His argument takes two courses: he argues, first, that under Alaska law,

criminal intent is an element of the crimes, and second, that, even if criminal intent is not acknowledged as an element by the Alaska law, due process requires that criminal intent be established by the government. We reject both arguments.

Under Alaska law, a person commits robbery if he uses or threatens to use immediate force with the intent to prevent or overcome resistance to the taking of property or with the intent to compel a person to deliver property. A.S. 11.-41.510. A person commits kidnapping if he restrains another with the intent to hold the person for ransom, use the person as a shield, inflict physical injury upon the person, interfere with the performance of a governmental function, or facilitate the commission of a felony.

A.S. 11.41.300(a)(1). An alternative provision for the crime of kidnapping defines the crime without reference to a specific intent element. A.S. 11.41.300-(a)(2). Alaska, however, does not require the state to prove a "criminal intent."

[3] Opinion differs as to whether duress generally prevents the mens rea required for criminal culpability. United States v. Mitchell, 725 F.2d 832, 835 (2d Cir. 1983). The Court of Appeals of Alaska held in Walker's appeal that under Alaska law, duress does not preclude an intent to commit the crime, but rather is only a justification for conduct that otherwise would be criminal. Walker, 674 P.2d at 828-29. Under this statutory scheme, we conclude that placing the burden to prove duress on

Walker was constitutional. By referring to the term, "criminal intent," Walker confuses the notions of objective and motive. The statutes prohibit particular action undertaken with a particular objective. For example, kidnapping is established if a defendant restrains another with the conscious objective of inflicting physical injury. But the reason that the defendant has this objective involves the separate issue of motive. Thus, a defendant can restrain another with the intent to inflict injury, in the sense that he knows that his actions will lead to injury or that his purpose is to cause injury, but act in this manner in order to comply with the demands of another. Because Alaska does not consider duress to be the negation of specific intent, duress may, con-

sistent with due process, be treated as an affirmative defense.

[4] Walker further argues that due process requires that Alaska adopt the view that criminal intent is an element of every crime, and that even if Alaska deems duress to be consistent with specific intent, it is necessarily inconsistent with criminal intent. The Supreme Court, in Martin v. Ohio, 107 S.Ct. 1098 (1987), in considering the constitutionality of imposing a burden on defendants to prove self-defense, rejected the argument that states may only proscribe conduct performed with criminal intent. Id. at 1103. Other circuits that have considered whether due process prohibits placing the burden on the defendant to prove duress have held that because society's notions of criminal law, as

implemented by the "'doctrines of actus reus, mens rea, insanity, mistake, justification, and duress,'" are constantly changing, constitutionalizing any formula, and thereby divesting the states of authority, would be inappropriate. Mitchell, 725 F.2d at 835 (quoting Powell v. Texas, 392 U.S. 514, 536 (1968)); see also Davis v. McCotter, 766 F.2d 203, 204 (5th Cir. 1985). 1/ We therefore find that due process does not require the prosecution to prove absence of duress.

1/ Walker relies on a line of Ninth Circuit cases beginning with United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978), in support of his position. These cases, however, do not employ a due process analysis. Rather they consider the requirements of federal law in federal trials.

II. Plain Error Review

[5] Walker alleges two errors in respect to instructions that were not raised to the trial court. We must first address a procedural issue. Walker did not object to the court's instructions at the trial level, but did raise the issues before the state appellate court. Normally, failure to comply with a state's contemporaneous objection rule [2/] bars habeas review unless the petitioner can show cause for the failure and actual

---

2/ Alaska requires a contemporaneous objection to trial errors. See, e.g., Owens v. State, 613 P.2d 259, 261 (Alaska 1980), but "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Alaska R. Crim. P. 47(b).

prejudice flowing from the error. Wainwright v. Sykes, 433 U.S. 72 (1977). If, however, a state appellate court overlooks the procedural default and considers the objection on the merits, the cause and prejudice requirement does not apply. Huffman v. Ricketts, 750 F.2d 798, 800-01 (9th Cir. 1984); see also County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979) ("[I]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."); Mullaney v. Wilbur, 421 U.S. 684, 688 n.7 (1975) (reviewing habeas petition on the merits because on direct appeal Maine Supreme Judicial Court waived procedural default and

addressed merits of federal constitutional claim).

The Alaska Court of Appeals in Walker, 674 P.2d at 829-30, acknowledged that Walker had failed to raise the objections before the trial court. The court said it could find plain error only "'where necessary to prevent a miscarriage of justice.'" Id. at 829 (citation omitted). We must determine whether the fact that the state appellate court reviewed the merits for plain error vitiates the cause and prejudice requirement of Wainwright v. Sykes. 3/ We conclude that it does.

3/ We requested additional briefing on this issue and have been assisted by the able and scholarly briefs filed by counsel for both parties.

[6] The Supreme Court has touched on this issue in dicta. In Engle v. Isaac, 456 U.S. 107 (1982), the Court found a procedural default in the defendant's failure to make a contemporaneous objection to a self-defense instruction. It noted in a footnote, however, that the State of Ohio permits the appellate courts to "overlook a procedural default if the trial defect constituted plain error." Id. at 135 n.44. Citing Mullaney and County Court of Ulster County, the Court continued, "[i]f Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review." Id. Although dicta, this is a clear statement that plain error review by a state appellate court negates the defendant's procedural default.

Moreover, Ninth Circuit precedent may be read to compel this result. In Huffman v. Ricketts, we reviewed the habeas claim of a petitioner who had not made a contemporaneous objection to a jury instruction in an Arizona trial. 750 F.2d at 800. The panel held that the petitioner's claim was not barred because even though the Arizona Court of Appeals observed that "[n]o objection was made below to the instruction," the state court went on to decide that "no fundamental error" had been committed. Id. at 801 & n.2. Because there is no reason to distinguish "fundamental error" from "plain error," Huffman v. Ricketts is binding precedent in this case. Cf. County Court of Ulster County, 442 U.S. at 151 n.10 (describing New York's exception to the contemporaneous objection

rule for errors that affect "fundamental constitutional rights").

In any event, we conclude that the purpose of the cause and prejudice determination permits us to consider a claim on federal habeas that has been reviewed by a state appellate court on the merits for plain error. Although applying a different standard of review than it would on direct appeal, a state appellate court reviewing for plain error reaches the merits of a petitioner's claim. [4/] Our policy of providing an opportunity for state courts to correct constitution-

---

[4/] To the extent Phillips v. Lane, 787 F.2d 208 (7th Cir.), cert. denied, 107 S.Ct. 249 (1986), may be at odds with our analysis, we disagree. The fact that the review was optional or under a different standard does not mean that the review was not on the merits.

al errors before a petitioner may seek relief in federal court permits us to review for error where the state court has in fact undertaken such review. No disrespect of the state court conviction may be implied from a review that a state appellate court itself has undertaken.

III. Trial Judge's Instruction on Credibility

[7] The Alaska Court of Appeals clearly reviewed one of the two instructional errors on the merits even though it had not been raised in the trial court -- Walker's claim that the trial court's instruction to view an accomplice's testimony with "distrust," coupled with its instruction that Walker may be found to be an accomplice, violated his fifth and sixth amendment rights by improperly

commenting on Walker's credibility. The court reviewed the instructions as to which error was claimed, the testimony that had been adduced at trial to which the instructions related and the interrelationship of other instructions. In reaching its conclusion that there was no plain error, the court conducted a review on the merits, which effectively lifted the state's procedural bar to review. We therefore reach the merits and hold there was no error. The instruction on accomplice testimony was followed immediately by an instruction that accomplice testimony must be corroborated. Through that instruction, the court explained to the jury that the reason for treating accomplice testimony in a more circumspect manner was that an accomplice may shift the blame onto others to avoid facing

liability for his own misdeeds. The main testimony against Walker at trial was provided by Willhite. We find that the instructions clearly referred to Willhite's testimony rather than that of Walker. Walker, 674 P.2d at 830.

IV. Failure to Define Recklessness

It is not so clear to us that the other claimed error was reviewed on the merits by the Alaska Court of Appeals. Walker alleged that the court's failure to define recklessness, proof of which prevents a defendant from using duress as a defense, violated due process. What the Alaska court said was:

> "We have previously concluded that a trial court's failure to define the term 'recklessly' was not plain error in Williams v. State, 648 P.2d 603, 608 (Alaska App. 1982). We said: 'The meaning of "recklessly" is well within the comprehension of the aver-

> age juror and the code definition appears to be a common sense definition of the term. We do not find that the failure to define the term "recklessly" constituted plain error [Footnotes omitted]. We see no reason to depart from that holding. We find no error.'"

Id. 829, 830. Whether this analysis should be treated as a review "on the merits", see Huffman v. Ricketts, or a refusal to review, see Moreau v. State, 588 P.2d 275 (Alaska 1978) [5/] because the issue had been decided in a previous case, is the question. We conclude that where the state court's review lends itself to the fair interpretation, as it does here, that it reviewed on the

---

[5/] In Moreau v. State, 588 P.2d 275, 279-80 (Alaska 1978) the court refused to address the merits of the claim of error, because in no event could it be considered plain error.

merits, we also may review on the merits. The Alaska court did not go so far as to hold that it was or was not error to fail to give the instruction but it did hold that it was not plain error and set forth its reasons, both that the court had so held in a previous case and that the average juror's common sense of the meaning would suffice.

[8] On the merits we find that the failure to define criminal recklessness did not cause Walker to be "in custody in violation of the constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to

establish plain error on direct appeal." Henderson v. Kibbs [sic], 431 U.S. 145, 154. The omission of an instruction is "less likely to be prejudicial than a misstatement of the law." Id at 155. Further, criminal recklessness under Alaska law [6/] relates essentially to the common-sense definition of recklessness, which the average juror could understand

---

6/ A.S. 11.81.900(a)(3) defines criminal recklessness in relevant part:

> [A] person acts "recklessly" with respect to a . . . circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the . . . circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. ...

and apply without an instruction. See Williams v. State, 648 P.2d 603, 608 (Alaska Ct. App. 1982).

[9] Moreover, although the omission may have been erroneous, Walker is not entitled to federal habeas relief unless "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). Walker argues that the instruction infected the trial because "it relieved the government of its burden of showing criminal recklessness . . . [and] aggravated the burden shift problem in the first argument." As discussed above, due process does not require the government to bear the burden of proof on duress. Recklessness is relevant to negate the duress defense. Therefore,

the failure to give an instruction defining recklessness is at most an error of state law.

V. Double Jeopardy

[10] Walker contends that the court's imposition of consecutive sentences for the two kidnappings and one robbery arising out of the same transaction violated double jeopardy. A state may punish separate offenses arising out of the same transaction without violating the double jeopardy clause. Albernaz v. United States, 450 U.S. 333 (1981). Under the test developed in Blockburger v. United States, 284 U.S. 299 (1932), robbery and kidnapping constitute separate offenses because both require proof of an element not required by the other

offense. [7/] Walker's claim that he cannot be punished cumulatively for the two kidnappings also fails. Under Alaska law, one act of assault aimed at two victims constitutes two separate crimes and may be punished separately. Cooper v. State, 595 P.2d 648 (Alaska 1979). In Walker's appeal the Alaska court of appeals applied this rule in the context of separate victims of a single incident of kidnapping. Walker, 674 P.2d at 832-33. Because the double jeopardy clause only "protects against multiple punishments for the same offense," Missouri v. Hunter, 459 U.S. 359, 367 (1983), we find

---

7/ Robbery requires taking property without right, A.S. 11.41.510 and kidnapping requires restraining another person, A.S. 11.41.300.

this claim to be without merit.

VI. Sentencing

Walker maintains that his total sentence of 89-years' imprisonment for his convictions for kidnapping, robbery, burglary, and theft, is excessive, and that the reason for its length is that the trial judge believed he was guilty of murder. He asserts that the total sentence violates his fifth and sixth amendment rights.

At the time of sentencing, the trial judge stated, "I agree with ... the state's position ... [that] you are guilty of murder." He then stated, "I don't propose to criticize or argue with the jury's verdict. They looked at it and they made their decision and I accept their decision." The trial judge also

said that Walker "must have been aware these people were going on their last ride," and that he had a "little different perception" from Walker's that Walker did not intend for the people to be killed.

The state appellate court and the district court found that the trial judge did not rely on the facts surrounding the murder in determining Walker's sentence. We do not address this factual issue because we conclude that the trial judge could properly rely on this information.

Sentencing courts must have wide latitude in their decisions as to punishment. Brothers v. Dowdle, 817 F.2d 1388, 1390 (9th Cir. 1987). Generally, a federal appellate court may not review a state sentence that is within the statu-

tory limits. [8/] Williams v. Duckworth, 738 F.2d 828, 831 (7th Cir. 1984), cert. denied, 469 U.S. 1229 (1985). We may vacate a sentence, however, if it was imposed in violation of due process. Brothers, 817 F.2d at 1390.

[11] The due process clause prohibits a trial judge from enhancing a sentence based on materially false or unreliable information, United States v. Messer, 785 F.2d 832, 834 (9th Cir. 1986), or based on a conviction infected by constitutional error. United States

---

8/ Walker was sentenced to 40 years for each of the two kidnapping convictions, 6 years for the robbery, 2 years for burglary, and 1 year for theft, all consecutive, for a total of 89-years imprisonment. The crime of kidnapping carries a sentence of between 5- and 99-years' imprisonment. A.S. 12.55.125(b).

v. Tucker, 404 U.S. 443, 447-48 (1972). We have held, however, that a sentencing judge may rely on "facts relating to a prior acquittal" in imposing an appropriate sentence. United States v. Morgan, 595 F.2d 1134, 1135-37 (9th Cir. 1979). Although Morgan involved a prior acquittal rather than a contemporaneous acquittal, we find the case to be controlling. Sentencing judges must be able to rely on as much information about a defendant as possible in order to fashion a punishment best tailored to the particular defendant. Id. at 1137. The trial judge clearly knew that Walker was acquitted of the murder charge, and thus knew to treat the facts with caution. It was perfectly proper, however, for the judge to consider the facts that the victims were killed and that during the course of the crime

Walker must have been aware that it was unlikely they were going to be permitted to live. There was more than a "minimal factual basis," United States v. Petitto, 767 F.2d 607, 611 (9th Cir. 1985), to justify consideration of the result of the crimes in which Walker participated, even though he was acquitted of the murder charge.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SCOTT A. WALKER, Petitioner, vs. ROGER ENDELL, Director, Alaska Department of Corrections, Respondent.	)	No. A84-275 Civ ORDER

This petition for habeas corpus brought by Scott A. Walker was argued before this court on March 24, 1986, following the Magistrate's report and recommendation that said petition be denied. After having heard argument and having carefully reviewed the record and applicable law, I approve and adopt the Magistrate's recommendation and deny the habeas corpus relief sought.

Following a jury trial before Alaska Superior Court Judge Seaborn Buckalew, Petitioner Scott Walker was convicted of kidnapping, robbery, burglary, and theft. Judge Buckalew sentenced Walker to a cumulative term of 89 years in prison. The Alaska Court of Appeals affirmed in a written opinion, Walker v State, 674 P.2d 825 (Alaska App. 1983). After the Alaska Supreme Court chose not to exercise its discretionary review, Walker filed a petition for habeas corpus asserting the result in the state court was erroneous on numerous constitutional grounds. First, he alleged that by requiring an accused to prove duress by a preponderance of the evidence, Alaska violates due process. Next, he urged that the trial court permitted him to be convicted on the basis of a civil recklessness stand-

ard, again in violation of due process. Third, he argued that the trial court's instruction to view an accomplice's testimony with caution, because it might have been applied to him by the jury, violated his right to an impartial jury trial. Forth, he claimed that Judge Buckalew violated his right to due process and the double jeopardy prohibition by imposing consecutive sentences on the robbery and kidnapping convictions. Finally, he argued that the trial court denied his right to due process and to a jury trial by ignoring the jury's verdict and imposing an 89 year sentence, in effect a sentence for murder. In a well-reasoned report, the Magistrate recommended that the petition for habeas corpus relief by denied. I hereby adopt the Magistrate's report and recommenda-

tion, except for the following comments intended to supplement the Magistrate's report on the issue of the duress defense.

On May 31, 1981, Walker, along with Dale Willhite and Timothy Hopkins, entered the Anchorage home of Mildred Walatka and her son, Herbert Oakley. According to Walker, the group's intent was to burglarize a coin collection which Walker knew to be in the residence. Each of the three co-defendants was armed. Walker testified he was surprised when Oakley answered the door, so he feigned car problems, planning to leave without further incident. But it was uncontroverted that while the burglars were in the house, Willhite drew his gun, and ivory and jewelry were taken. At gunpoint, Oakley and his mother were then

forced into their own car. With Walker driving, the five went to Mrs. Walatka's bank, where she was forced to remove $600 from her account. Again with Walker at the wheel, the burglars took Mrs. Walatka and Mr. Oakley away from the city where both were shot to death. Walker assisted in secreting the bodies after the homicides.

Walker claimed that all of his actions after the feigned telephone call in the Walatka residence were motivated by a fear for his own safety and that of the two victims. He denied shooting either Oakley or Mrs. Walatka.

He was tried on charges of theft, burglary, robbery, two counts of kidnapping, and two counts of murder. At trial, he admitted the theft and burglary charges, and was convicted of each. The

jury apparently accepted some, but not all of his controverted testimony, since he was found not guilty on each count of murder, but he was convicted of robbery and both counts of kidnapping. The petition addresses only the kidnapping and robbery convictions.

Walker contends that by placing the burden of proving duress by a preponderance of evidence on him, the trial court's instruction violated the Due Process Clause of the U.S. Constitution. 9/ Alaska's statutory scheme designates

---

9/ Under A.S. 11.81.440, the defense of duress is not available "when one recklessly places oneself in a situation in which it is probable that one will be subject to duress." The state believes this court need not reach Walker's constitutional claims, because it submits that insufficient evidence was presented to justify any duress instruction. I

(Footnote continued on next page)

"duress" as one of several affirmative defenses available to criminal defendants, and requires the defendant to persuade the fact finder that he was under duress by a preponderance of the evidence. Walker maintains that this shift of the burden of persuasion of duress contravenes In re Winship, 397 U.S. 358 (1970), in which the United States Supreme Court declared that the Due Process Clauses "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In 1977, the United States Supreme

(Footnote 9 continued)

adopt the Magistrate's reasoning and conclusion that Walker did produce sufficient evidence at trial to entitle him to the instruction.

Court held in Patterson v. New York, 432 U.S. 197 (1977), that when an affirmative defense does not serve to negate any facts which prove any element of the crime charged as defined by the state, and when the state is within its constitutional powers to sanction the crime without providing for the affirmative defense, then the state may shift the burden to the defendant to prove the affirmative defense with respect to that crime, without violating the Due process Clause. Patterson v New York, 432 U.S. 197 (1977). Thus, a two-step inquiry has been established for determining whether an affirmative defense to a criminal charge conforms to the Due Process Clause -- does proof of the defense negate any elements of the crime as defined by the state, and is the affirmative defense

otherwise required as a matter of Due Process. In the first step of the test, we look solely to how the state has defined its crime, and of course, to how the crime was charged in the jury instructions.

Patterson involved a New York practice by which an accused was guilty of second degree murder if he was found beyond a reasonable doubt to have killed intentionally. The crime was reduced to manslaughter if defendant proved by a preponderance of the evidence that he acted under the influence of "extreme emotional disturbance". The court upheld this practice upon concluding that the prosecution continued to bear the burden of proof of every essential element. The fact that the defendant may have acted under the influence of extreme emotional

disturbance for which there was a reasonable explanation, did not negate the fact that he may have killed intentionally. Patterson followed and severely restricted Mullaney v Wilbur, 421 U.S. 684 (1975). Mullaney rejected a Maine practice whereby malice aforethought was made an explicit element of intentional homicide, and the defendant nevertheless had the burden of proving that he acted in the heat of passion on sudden provocation to have the crime reduced to manslaughter. Because proof of heat of passion negated malice, the court held the practice violated the Winship requirement that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant was charged.

The defendant in this case maintains

that proof of duress, as defined in the Alaska statutes and jury instructions, negates the intent and voluntariness elements in the crimes of kidnapping and robbery. While it may be possible to defines duress, intent and actus reus in such a way that proof of duress does negate the intent and/or actus reus elements of a particular crime, that has not occurred here. In Walker's trial, the jury instructions closely followed the statutory language and provide in relevant part, as follows:

> A person commits the crime of kidnapping if he restrains another person with intent to inflict physical injury upon her or place her or a third person in apprehension that any person will be subject to serious physical injury . . .
>
> If you find from your consideration of all the evidence that each of these propositions has been proved

beyond a reasonable doubt, then you shall find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you shall find the defendant not guilty.

A person commits the crime of robbery in the first degree if in the course of taking or attempting to take property from the immediate presence and control of a person, he uses or threatens the immediate use of force upon any person with the intent to prevent or overcome resistance to his taking the property or his retention of the property after taking or compel any person to deliver the property or engage in other conduct which might aid in the taking of the property and in the course of the taking or attempted taking or in immediate flight after the taking he or another participant was armed with a deadly weapon or represented by words or other conduct that he or another participant was so armed.
. . .

If you find from your consideration of all the evidence that each of

these propositions has been proved beyond a reasonable doubt, then you shall find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you shall find the defendant not guilty.

In the crimes charged in the indictment there must exist a joint operation of an act and a culpable mental state. To constitute a culpable mental state it is not necessary that there exist an intent to violate the law. When a person intentional does that which the law declares to be a crime, he is acting with a culpable mental state, even though he may not know that his act or conduct is unlawful. . . .

A person acts "intentionally" with respect to a result when his conscious objective is to cause that result.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may be able to see and hear and thus be able to give

direct evidence of what a defendant does or fails to do, there can be no eye witness to the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts he knowingly does or knowingly omits. Any such reasonable inference is entitled to be considered by the jury in determining whether or not the prosecution has proved beyond a reasonable doubt that the defendant possessed the required intent.

In determining issues of intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of the defendant's state of mind.

Motive is not an element of the crime charged. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence.

> You will therefore give its presence or absence, as the case may be, the weight you believe it should have as evidence. . . .
>
> It is an affirmative defense to any charge that the defendant engaged in the proscribed conduct because he was coerced to do so by the use of unlawful force upon him or a third person, which force a reasonable person in his situation would have been unable to resist. Therefore, <u>if you find it more likely than not that the defendant was coerced to engage in proscribed conduct by the use of unlawful force upon him or a third person, which force a reasonable person in his situation would have been unable to resist, you shall find the defendant not guilty.</u>
>
> The defense of duress is not available when a person recklessly places himself in a situation in which it is probable that he will be subject to duress.
>
> (Emphasis supplied [by the court] throughout instructions.)

Walker submits that proof of coercion to engage in kidnappings and robber-

ies, by the use of unlawful force upon him, which force a reasonable person in his situation would have been unable to resist, would negate both the intent and voluntariness elements of the above crimes for which he was charged. I disagree, and conclude that the instructions given for duress in this case do not negate the state's burden to prove any element defining the substantive crimes. A reasonable person who commits an unlawful act because he/she is reasonably so fearful of an unlawful threat upon him as to be unable to resist, may nonetheless have affirmatively acted with the conscious objective of performing that act to achieve a result that is criminal under the law. The act may be conscious or voluntary, although no ill will or evil motive may be involved.

This interpretation of the instructions is consistent with the theoretical explanation of the duress defense expressed by Professors LaFave and Scott and adopted by the Alaska Court of Appeals -- namely, that duress justifies, but does not exculpate, a criminal act:

> The rationale of the [duress] defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Rather it is that, even though he has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is justified because he has thereby avoided a harm of greater magnitude.

W. LaFave and A. Scott, Criminal Law, § 49, at 374 (1972), cited in Walker v State, 674 P.2d 825, 828-29 (Alaska App. 1983). While the state's rationalization

of the duress defense would not prevail over the jury instructions, if by those instructions the duress defense did indeed negate an element of the offenses charged, this is not the case here.

Petitioner Walker correctly points out that assorted courts and commentators view duress as precluding the culpable mental state required for criminal responsibility. See United States v Mitchell, 725 F.2d 832, 835 (2nd Cir. 1983). The conclusion as to whether a state's duress defense negates that state's intent or voluntariness requirement for a particular crime will rest in part on the statutory definitions utilized by the state, but additionally will often rest on a philosophical view as to the nature of the mental state and voluntariness of conduct which should be

required for criminal responsibility. Id. Setting philosophical views aside, I have found in this case that the duress defense as defined in Alaska's statutes and jury instructions at bar is not inconsistent with the intent and act requirements as so defined.

Next, step two in the Patterson analysis requires consideration of whether, even if proof of duress does not negate explicit elements of the crimes charged, proof of such elements must be constitutionally required under the Due Process Clause. I cannot say that the Due Process Clause of the United States Constitution requires that proof of the absence of duress is a necessary element of the state crimes of robbery and kidnapping. In Patterson, the Court held:

> We thus decline to adopt as a constitutional imperative operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Patterson, 432 U.S. at 210. The Court emphasized that it is the state's business to define crime, and that the

applicability of the reasonable doubt standard has always been dependent on how a state defines the offense that is charged in any given case. Id. at 210-211.

The court did caution that "there are obviously constitutional limits beyond which states may not go in this regard". Id. at 210. But a state is within these limits so long as the crime, as defined by the state, is "otherwise within [the state's] constitutional powers to sanction by substantial punishment," id. at 208, and does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. at 202. The Patterson court found it to be consistent with Due Process for New York to punish a defendant for murder,

unless he shows that he is less culpable because he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. The Patterson court also reaffirmed Leland v Oregon, 343 U.S. 790 (1952), which found it was constitutional for a state to burden the defendant with proving his insanity defense. See also Rivera v Delaware, 429 U.S. 877 (1976) (dismissing for want of a substantial federal question appeal from Delaware decision placing burden of proving insanity on defendant). Of course, at common law, duress was no defense to the crime of murder, see United States v Mitchell, 725 F.2d 832, 835, n.4 (2nd Cir. 1983), and thus, historically, proof of the absence of duress has never been a fundamental and essential element of

every crime.

While the view that an act done under duress is nevertheless willful and voluntary is open to challenge on moral, philosophical and medical grounds, the Supreme Court has refrained from construing the Constitution to impose burden of proof rules upon the states concerning various defenses. "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." Powell v Texas, 392 U.S. 514, 536 (1968). See Patterson, 432 U.S. at 207-210. I conclude that the constitutional limits beyond which states may not go, have not

been reached in this case.

DATED this 15th day of August, 1986, at Anchorage, Alaska.

/s/ James F. Fitzgerald
United States District
Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SCOTT A. WALKER, Petitioner, vs. ROGER ENDELL, Director, Alaska Department of Corrections, Respondent.	No. A84-275 Civ REPORT AND RECOMMENDATION ON PETITION FOR HABEAS CORPUS

Following a jury trial before Alaska Superior Court Judge Seaborn Buckalew, Petitioner Scott Walker was convicted of kidnapping, robbery, burglary and theft. Judge Buckalew sentenced Walker to a cumulative term of 89 years in prison. The Alaska Court of Appeals affirmed in a written opinion, Walker v State, 674 P.2d 825 (Alaska App. 1983). After the Alaska Supreme Court chose not to exercise its

discretionary review, Walker filed a petition for habeas corpus asserting the result in the state courts was erroneous on four constitutional grounds. First, he alleged that by requiring an accused to prove duress by a preponderance of the evidence, Alaska violates due process. Next, he urged the trial court permitted him to be convicted on the basis of a civil recklessness standard, again in violation of due process. Third, he argued the trial court's instruction to view an accomplice's testimony with caution, because it might have been applied to him by the jury, violated his right to an impartial jury trial. Finally, he claimed that Judge Buckalew violated his right to due process and the double jeopardy prohibition by imposing consecutive sentences on the robbery and

kidnapping convictions, and by imposing a total term of 89 years.

The petition has been referred to the undersigned under Local Magistrate Rules 10 and 14 for a Report and Recommendation. For the reasons states below, I recommend it be denied.

FACTS BELOW

On May 13, 1981, Walker, along with Dale Willhite and Timothy Hopkins, entered the Anchorage home of Mildred Walatka and her son, Herbert Oakley. According to Walker, the group's intent was to burglarize a coin collection which Walker knew to be in the residence. Each of the three codefendants was armed. Walker testified he was surprised when Oakley answered the door, so he feigned

car problems, planning to leave without further incident. But it was uncontroverted that while the burglars were in the house, Willhite drew his gun, and ivory and jewelry were taken.

At gunpoint, Oakley and his mother were then forced into their own car. With Walker driving, the five went to Mrs. Walatka's bank, where she was forced to remove $600 from her account. Again with Walker at the wheel, the burglars took Mrs. Walatka and Mr. Oakley away from the city where both were shot to death. Walker assisted with secreting the bodies after the homicides.

Walker claimed that all of his actions after the feigned telephone call in the Walatka residence were motivated by a fear for his own safety and that of the two victims. He denied shooting

either Oakley or Mrs. Walatka.

He was tried on charges of theft, burglary, robbery, two counts of kidnapping, and two counts of murder. At trial, he admitted the theft and burglary charges, and was convicted of each. The jury apparently accepted some, but not all of his controverted testimony, since he was found not guilty on each count of murder, but he was convicted of robbery and both counts of kidnapping. The petition addresses only the kidnapping and robbery convictions.

ALASKA'S REQUIREMENT THAT WALKER PROVE DURESS BY A PREPONDERANCE IS CONSTITUTIONALLY PERMISSIBLE

Walker's first contention is that by placing the burden of proving duress by a preponderance of the evidence on him, the

trial court's instructions violated due process. The court's instruction on duress is set out in the margin. 1/ *

The state first attempts to avoid petitioner's challenge, saying insufficient evidence was presented to justify any instruction. Alternatively, the state argues that if an instruction was required, the one given comported with due process.

Petitioner satisfied his burden of production on duress.

The state's argument that petitioner did not satisfy his burden of production below raises issues of state rather than federal law.

---

* All footnotes in the Magistrate's Report were placed (by the magistrate) at the end of the main text.

Duress is an affirmative defense in Alaska, available "if the defendant engaged in a proscribed conduct because he was coerced to do so by use of unlawful force upon him or a third person which force a reasonable person in his situation would have been unable to resist." AS 11.81.440(a). "Force" under AS 11.81.900(b)(22), is defined to include any threat of imminent bodily impact, and under AS 11.81.900(b)(54), "threat" includes "a menace, however communicated". Duress is not available when a person recklessly places himself in a situation in which it is probable that he would be subject to duress. AS 11.81.440(b).

To be entitled to a "duress" instruction the defendant must come forward with "some evidence" which places

the defense in issues, AS 11.81.900(b). "Some evidence" was recently defined in David v State, 698 P.2d 1233 (Alaska App. 1985):

> The legal standard is clear: could the evidence at trial, viewed in the light most favorable to the defendant, arguably lead a juror to entertain, on the theory set forth in the proposed instructions, a reasonable doubt as to the defendant's guilt? 698 P.2d at 1235.

To substantiate its position that Walker was entitled to no duress instruction, the state first contends that Walker did not show enough evidence of "force". But there was evidence at trial that Walker knew that both Hopkins and Willhite had guns when they entered the Walatka residence, that Hopkins and Willhite pulled their guns to Walker's surprise, and that Walker knew Hopkins had previously killed an accomplice in

another burglary for losing his nerve. I find this was sufficient evidence to justify a duress instruction standard since Willhite and Hopkins' behavior could have been found to be a threat of physical violence directed to Walker to continue with the criminality.

The state has also argued that a duress instruction should not have been given because Walker recklessly placed himself in a position where he should have expected force directed at him by one or both accomplices. AS 11.81.-440(b). But if a jury had accepted Walker's testimony that nobody expected the residence to be occupied, the resultant violence and alleged duress would have been insufficiently foreseeable to preclude instruction as a matter of law.

Thus the state cannot avoid dealing

with Walker's constitutional challenge on the merits.

Alaska's duress defense does not violate due process.

Walker's challenge to the trial court's instruction on duress is in effect a challenge to Alaska's underlying statutory scheme which designates "duress" as one of several "affirmative defenses" available to criminal defendants, [2/] and which then requires the defendant to persuade the fact finder that he was under duress by a preponderance of the evidence. AS 11.81.900-(b)(1).

The constitutionality of such allocations of proof has been the subject of numerous cases before the United States Supreme Court, two of which

deserve special attention, Mullaney v Wilbur, 421 U.S. 684, 44 L.Ed.2d 508 (1975) and Patterson v New York, 432 U.S. 197, 53 L.Ed.2d 281 (1977). In Mullaney the court confronted a Maine practice which conclusively presumed "malice aforethought" and thus murder in intentional homicides unless the defendant showed, by a preponderance "that he acted in the heat of passion on sudden provocation," in which case the crime was reduced to manslaughter. The court held that practice violated the Winship [3/] requirement that the state prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." Commentators and courts, writing in Mullaney's wake, often read the case broadly, so as to require the imposition of the burden of persua-

sion on the prosecution with regard to many, if not all, of the affirmative defenses. See, e.g., Comment, Unburdening the Criminal Defendant: Mullaney v Wilbur and the Reasonable Doubt Standard, 11 Harv.C.R.-C.L.L. Rev. 390 (1976); Evans v State, 28 Md.App. 640, 349 A.2d 300 (1975), aff'd 278 Md. 197, 362 A.2d 629 (1976).

Such an expansive reading of Mullaney was undermined in Patterson when the court upheld a New York practice by which an accused was guilty of murder in the second degree if he was found beyond a reasonable doubt to have killed intentionally. The crime could be reduced to manslaughter if, by a preponderance, the defendant proves that he acted under the influence of "extreme emotional disturbance." Reasoning that every essential

element necessary to constitute the crime of second degree murder still had to be proved beyond a reasonable doubt, the court found no Winship due process violation, and upheld the practice.

Reconciling these cases is no easy matter. Under what appears to be the prevailing view, the particular practice is scrutinized to determine whether it involves a "true affirmative defense", which consists of facts which exonerate the defendant (or reduce the degree of the crime charged) and do not simply disprove an element of the crime. Engle v Isaac, 456 U.S. 107, 120, 71 L.Ed.2d 783, 795 (1982); Mullaney v Wilbur, 421 U.S. at 705-706, 44 L.Ed.2d at 523-24 (Rehnquist, J., concurring). Typically, this involves review of how the particular jurisdiction defines the crime.

Anomalies in the cases are explained by different definitions of substantive crimes in the different jurisdictions. Thus, requiring the defendant to prove the absence of self-defense by a preponderance does not violate due process in West Virginia because the absence of self-defense is not an element of murder, Williams v Mohn, 462 F.Supp. 756 (N.D. W.Va. 1978), modified 605 F.2d 1208 (4th Cir.), but is improper in Michigan where the absence of self-defense is an element of murder, Berrier v Egeler, 583 F.2d 515 (6th Cir. 1978), cert. denied 493 U.S. 955, 58 L.Ed.2d 347. In Michigan, the state must prove the absence of self-defense beyond a reasonable doubt. Id.

Under this analysis, Alaska's statutory designation of duress as an affirmative defense, and its concomitant

choice to shift the burden of persuasion to the defendant would be dispositive of petitioner's claim. But petitioner asks this court to look beneath the state's characterization of duress as an affirmative defense to recognize that duress necessarily negates specific intent. Because kidnapping and robbery are specific intent crimes, Walker argues that the burden of persuasion must remain with the state, and the state must establish the absence of duress beyond a reasonable doubt. See Francis v Franklin, 471 U.S. ___, 85 L.Ed.2d 344, 356 (1985); Engle v Isaac, 456 U.S. 107, 121-22, 71 L.Ed.2d 583, 796-97 (1982); Sandstrom v Montana, 442 U.S. 510, 518, 523, 61 L.Ed.2d 39, 47, 50-51 (1979); Morissette v United States, 342 U.S. 246, 274-75, 96 L.Ed. 288, 306-07 (1952);

United States v Mitchell, 725 F.2d 832, 835 (2d Cir. 1983).

In its opinion affirming Walker's conviction, the Alaska Court of Appeals interpreted duress as it is defined in AS 11.81.440 not to negate mens rea, but to excuse it. 674 [P.2d] at 828-29. The court relied on the following language from W. LaFave and A. Scott's Criminal Law, §49, at 374 (1972):

> The rationale of the [duress] defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Rather it is that, even though he has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is justified because he has thereby avoided a harm of greater magnitude.

In petitioner's view, however, a specific

intent to rob or kidnap cannot exist when a defendant acts because of duress. To establish his right to relief on the petition, petitioner must prove that Alaska's gloss is not permitted as a matter of due process.

The identical constitutional issue was carefully reviewed in United States v Mitchell, 725 F.2d 832, 835 (2d. Cir. 1983), where Judge Newman wrote: 4/

> Whether duress is inconsistent with specific intent raises broad philosophical issues concerning the nature of voluntary action for purposes of criminal responsibility and the appropriate conditions for holding a person morally blameworthy. Some view duress as precluding the mens rea required for criminal culpability. See People v Condley, 69 Cal.App.3d 999, 1011-12, 138 Cal.Rptr. 515, 521-22, cert. denied 434 U.S. 988, 98 S.Ct. 619, 54 L.Ed.2d 483 (1977); Perkins, "The Doctrine of Coercion", 19 Iowa L.Rev. 507, n.1 (1934) [n.3] However, others

> contend that duress does not preclude a finding of the voluntariness required for criminal responsibility because the defendant, though motivated by an impulse to save himself or another from serious harm, nonetheless forms an intention to commit a crime and chooses to act upon that intention. See G. Williams, Criminal Law, § 24 at 751 (2d ed. 1961); 2 J. Stephen, History of Criminal Law 101-04 (1883). [n.4] In reflecting on these competing views, we do well to bear in mind the Supreme Court's observations that "[t]he doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man," Powell v Texas, 392 U.S. 514, 536, 88 S.Ct. 2145, 2156, 20 L.Ed.2d 1254 (1968). That thought counsels against constitutionalizing any particular formula for disproving the defense of duress.

Though the Mitchell court ultimately avoided the constitutional issue here

presented and on policy grounds adopted a rule placing the burden of persuasion on the government to show the absence of duress beyond a reasonable doubt, 725 F.2d 836, Judge Newman's historical analysis appears accurate. Duress has been interpreted in more than one way. So too is Judge Newman's conclusion accurate. Requiring duress to be defined in such a way that it necessarily negates intent is possible, but would preclude the state's from adopting the various approaches to duress now employed. 5/ Neither history nor the constitution require such a result despite sound policy reasons, see United States v Mitchell, 725 F.2d at 836-37, which may support it. In short, I conclude that duress does not have to be defined to preclude specific intent 6/, and that

Alaska may define an affirmative defense of duress which places the burden of proof on the defendant by a preponderance to establish the defense. 7/

The apparent continued validity of Leland v Oregon, 343 U.S. 790, 96 L.Ed. 1302 (1952), also supports the result reached here. In Leland, the court held that a state could place on the defendant the burden of persuading the fact finder that he was insane beyond a reasonable doubt. While it might be argued that insanity also necessarily precludes specific intent, and that the burden of proving insanity by any standard cannot be placed on a defendant, Leland remains the law. See Rivera v Delaware, 429 U.S. 877, 50 L.Ed.2d 160 (1976) [challenge to Leland dismissed for want of a substantial federal question].

BECAUSE PETITIONER DID NOT OBJECT TO THE TRIAL COURT'S FAILURE TO INSTRUCT ON RECKLESSNESS, HABEAS RELIEF IS UNAVAILABLE

The second paragraph of the trial court's instruction on duress indicated the defense was not available if Walker had recklessly placed himself in a situation in which it was probable that he would be subject to duress. The court did not, however, define "recklessly" or any of its cognates elsewhere in the instructions. Petitioner now claims that this failure permitted the jury to use its own definition of recklessness, which would have been closer to that used in civil cases, and that the result denied him due process and a fair trial. There is no indication that the trial court was ever asked to define "recklessly"; the issue apparently surfaced for the first

time in the Alaska Court of Appeals.

The Court of Appeals rejected petitioner's challenge to the instructions on appeal because it did not find "plain error", the threshold determination required in that forum to consider a matter not presented to the trial court. Relying on a previous case, Williams v State, 648 P.2d 603, 608 (Alaska App. 1983), the court reasoned that the meaning of "recklessly" was "will within the comprehension of the average juror and the code definition appears to be a common sense definition of the term." 674 P.2d at 829-30.

A matter not raised at trial may not be presented in a federal habeas petition unless the petitioner can show cause for failure to raise it at trial, as well as actual prejudice, Engle v Isaac, 465 U.S.

107, 129, 71 L.Ed.2d 783, 801 (1982); Wainwright v Sykes, 433 U.S. 72, 87, 53 L.Ed.2d 594, 608 (1977), or unless it can be established that despite the procedural default in the trial court, a state appellate court reached the issue, County Court of Ulster County v Allen, 442 U.S. 140, 154, 60 L.Ed.2d 777, 790 (1979).

The United States Supreme Court recently elaborated on what constitutes "prejudice" in cases where erroneous jury instructions are claimed to have been given, but no contemporaneous objection was made at trial. United States v Frady, 456 U.S. 152, 71 L.Ed.2d 8165 (1982), and Henderson v Kibbe, 431 U.S. 145, 52 L.Ed.2d 203 (1977). In Kibbe, the court observed:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed

> be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.
>
> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," ... not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned'." [citing Cupp v Naughten, 414 U.S. 141, 146-47, 38 L.Ed.2d 368] 431 U.S. at 154, 52 L.Ed.2d at 212.

In Frady, Justice O'Connor elaborated:

> [Henderson v Kibbe] summarized the degree of prejudice we have requir-

> ed a prisoner to show before obtaining collateral relief for errors in the jury charge as "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", not merely whether "the instruction is undesirable, erroneous, or even universally condemned."
>
> . . .
>
> We reaffirm this formulation, which requires that the degree of prejudice resulting from instruction error be evaluated in the total context of the events at trial. 456 U.S. at 169, 71 L.Ed.2d at 831.

No suggestion why petitioner's counsel chose not to object has been made to this court, be it novelty of the issue, see, e.g., Myers v State of Washington, 646 F.2d 355, 359-60 (9th Cir. 1981), or otherwise. Without any such assertion, or any other facts to make out "cause", the failure to raise the matter at trial is a bar to relief in

this court.

As an alternative ground for denial of the petition on this issue, I find that insufficient "prejudice" under the Kibbe-Frady standard has been established. First, it is alleged that an instruction was omitted, not improperly given. An omission is "less likely to be prejudicial than a misstatement of the law," Henderson v Kibbe, 431 U.S. 145, 155, 52 L.Ed.2d 203, 213 (1977). Second, there is substantial overlap between what content jurors would expect "recklessly" to have, and the legal definition which would have been given had timely objection been made. I find that the error, if any was made, was not of such magnitude to infect the entire trial.

Neither do I find that the state appellate court reached the "merits" of

the claim made here. Ulster County. The court applied its "plain error" rule precisely because it did not review the merits as it might have if a trial objection had been preserved.

BECAUSE PETITIONER DID NOT OBJECT TO THE TRIAL COURT'S ACCOMPLICE INSTRUCTION, HABEAS RELIEF IS UNAVAILABLE

The trial court instructed the jury both to view an accomplice's testimony with distrust and that Walker could have been convicted as an accomplice. The relevant instructions are set out below. 8/ Petitioner now claims that the effect of these instructions considered together was to suggest impermissibly to the jury that Walker's testimony should be viewed with distrust. Cf. Cool v United States, 409 U.S. 100, 34 L.Ed.2d 335 (1972).

As with the objection to the failure to define "recklessly" discussed above, no objection was made at trial to either of the instructions here challenged. Petitioner is again faced with the "cause and "prejudice" standard of the Wainwright and Kibbe-Frady lines of cases.

As with the previous ground for grant of the petition, no "cause" has been suggested for petitioner's failure to raise an objection to the instructions in the trial court, a defect which in and of itself is sufficient for denying habeas relief.

As did the Alaska Court of Appeals in applying its more lenient "plain error" standard, I find that the instructions taken as a whole would reasonable by construed to apply the accomplice instruction to Willhite, who the jury

knew had been given immunity for his testimony. A separate instruction told the jury to subject Walker's testimony to the same scrutiny as that of any other witness. Evaluating the degree of prejudice resulting from the instructional error in the "total context of the events at trial," United States v Frady, 456 U.S. at 169, 71 L.Ed.2d at 831, I cannot conclude that it infected the entire trial.

Finally, the state appellate court made no attempt to reach the merits of petitioner's objection to the instruction but only to review it under its "plain error" rule. 674 P.2d at 830. As such, the Ulster County exception to the "cause and prejudice" rule of Wainwright v Sykes has no application.

THE CONSECUTIVE SENTENCES IMPOSED DID NOT VIOLATE DOUBLE JEOPARDY

Following Walker's conviction, Judge Buckalew sentenced him to 40 year terms on each of the kidnapping counts, six years for the robbery, one year each on two theft counts and two years on the burglary. All the sentences were consecutive except for one theft count which was to run concurrently with the burglary sentence. In his petition, Walker claims that the consecutive sentences for the kidnapping counts and the robbery count violated the double jeopardy clause of the Fifth Amendment as it has been incorporated in the Fourteenth Amendment and applied to the states, Benton v Maryland, 395 U.S. 784, 23 L.Ed.2d 707 (1969).

In ruling on a habeas petition it is

not this court's function to review the imposition of consecutive sentences under applicable state law, or under federal law as it might have been applied had a federal defendant been convicted of two counts of kidnapping and robbery. Most of the cases which petitioner cites are inapposite [9] because they do not reach the constitutional issue posed under the double jeopardy clause: was Walker twice punished for the same offense?

The State correctly points out that the Alaska Supreme Court has held that consecutive sentences are permissible under its law when one criminal act is aimed at multiple victims. Cooper v State, 595 P.2d 648, 650 (Alaska 1979). Under Cooper, consecutive sentences for the two counts of kidnapping are permissible. [10] The Alaska Supreme

Court has also held that where two different societal interests are protected by criminal statutes, the legislature may make each a separate crime for which consecutive punishments are authorized. Calder v State, 619 P.2d 1026, 1028 (Alaska 1980); see Barry v State, 675 P.2d 1292, 1296-97 (Alaska App. 1984). Robbery, involving the forced removal of Mrs. Walatka's savings, and kidnapping, involving the coerced restraint of both Mrs. Walatka and Mr. Oakley, are such separate interests.

Missouri v Hunter, 459 U.S. 359, 74 L.Ed.2d 535 (1983), instructs that double jeopardy analysis is far less rigorous than the test for determining when separate punishments are authorized under Alaska law, as articulated in Cooper and Calder. In Hunter, even though the

Missouri Supreme Court construed the two offenses -- robbery and armed criminal action -- as defining the same crime, the United States Supreme Court reversed the state court's holding that the federal double jeopardy clause precluded separate convictions and separate sentences. Chief Justice Burger wrote:

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger [284 U.S. 299, 76 L.Ed. 306 (1932)] a court's task of statutory construction is at an end and the prosecutor may seek and the trial court ... may impose cumulative punishment under such statutes in a single trial. 459 U.S. at 368-69, 74 L.Ed.2d at 544.

Hunter's deference to state legislatures and their intent undermines any application of the double jeopardy prohibition to Walker's kidnappings of both Mrs.

Walatka and Mr. Oakley, and to the robbery: Walker's "transaction" involved multiple "offenses", each of which can be punished with consecutive sentences. See United States v Woodward, 469 U.S. ___, 83 L.Ed.2d 518 (1985); People of Territory of Guam v Snaer, 758 F.2d 1341, 1344 (9th Cir. 1985).

THE TRIAL JUDGE DID NOT DENY PETITIONER'S DUE PROCESS AND JURY TRIAL RIGHTS BY THE CUMULATIVE SENTENCE OF 89 YEARS

Petitioner's final argument is that the trial judge, by sentencing Walker to a cumulative total of 89 years, effectively sentenced him for the murders of Mrs. Walatka and Mr. Oakley, though the jury found him not guilty of the homicides. Petitioner points to language in the trial judge's sentencing remarks in

which he said: "I agree with the ... State's position ... that ... you are guilty of Murder I." At the request of the parties, I have reviewed a tape of Judge Buckalew's sentencing remarks. I am convinced that the judge, despite his avowed personal view, did not allow it to interfere with his sentence. Indeed, he went on to say, shortly after the comment quoted above: "As a matter of law you have been acquitted of that charge ... . And the way that this case developed, I don't propose to criticize or argue with the jury's verdict. They worked at it and they made their decision, and I accept their decision."

Kidnapping, under Alaska law, could have led to a sentence of from five to 99 years, AS 12.55.125(b). A review of the record developed below indicates both

that Walker might have been characterized as a particularly vicious offender, and that the offense might have been characterized as the most serious sort of kidnapping. Given that the cumulative sentence was not in excess of that authorized for a single count of kidnapping, and given the judge's avowed willingness to follow the jury's verdict, I do not find that the judge ignored the jury's verdict.

CONCLUSION

Having completed my discussion of the grounds asserted by Walker in support of his petition, and finding no ground for issuance of the writ of habeas corpus, I hereby recommend that the petition be denied.

IT IS SO RECOMMENDED this 9th day of January, 1985, at Kodiak, Alaska.

/s/ Matthew D. Jamin
United States Magistrate

Footnotes

1 It is an affirmative defense to any charge that the defendant engaged in the proscribed conduct because he was coerced to do so by the use of unlawful force upon him or a third person, which force a reasonable person in his situation would have been unable to resist. Therefore, if you find it more likely than not that the defendant was coerced to engage in proscribed conduct by the use of unlawful force upon him or a third person, which force a reasonable person in his situation would have been unable to resist, you shall find the defendant not guilty.

The defense of duress is not available when a person recklessly places himself in a situation in which it is probable that he will be subject to

duress.

2

Alaska has chosen to make the following justifications for crimes "affirmative defenses", and as such, to similarly place the burden of persuasion on the defendant by a preponderance: necessity, AS 11.81.320; and entrapment, AS 11.81.450. See also AS 11.41.300(b), (d). By not designating self-defense and several other principles of justification as "affirmative defenses", the burden of persuasion as to those rests on the prosecution to disprove them beyond a reasonable doubt.

3

397 U.S. 358, 364, 25 L.Ed.2d 368, 375 (1970).

4

Judge Newman's footnotes from the quoted portion are here set out in their entirety:

> [4] This view is consistent with a deterrence theory of criminal sanctions, for an individual deprived of free will cannot be deterred by the likelihood of future punishment. See Model Penal Code § 2.09, comment at 5-7. But see

2 J. Stephen, History of Criminal Law 107 (1883).

[5] The view that an act done under duress is nevertheless willful and voluntary derives some support from the restrictive Anglo-American treatment of the duress defense. At common law, duress was no defense to the crime of murder. See, e.g., Arp v State, 97 Ala. 5, 12 So. 301 (1893); State v Nargashian, 26 R.I. 299, 58 A. 953 (1904). Blackstone contended that a person under duress ought to choose "rather to die himself than escape by the murder of an innocent." 4 W. Blackstone, Commentaries, 30.

Some states still do not recognize a defense of duress for certain crimes, such as crimes punishable by death, e.g., Cal.-Pen.Code § 26(7) (West Supp. 1980); Idaho Code § 18-201(4) (1979), or even most serious offenses, e.g., Colo.Rev.Stat. § 18-1-708 (1978) (murder in the first degree); Iowa Code Ann. § 704.10 (West 1979) (intentional or reckless act causing physical injury); Ky. Rev. Stat. § 501.090 (1975) (intentional homicide). However, some states allow duress as a defense to any

crime, see, e.g., Conn. Gen. Stat. § 53a-14 (1979); N.Y.Penal Law § 40.00 (McKinney 1975).

5

A number of authorities mentioned elsewhere in this opinion cite the Model Penal Code as authority for the proposition that the burden of persuasion for duress should be on the prosecution. See Model Penal Code § 2.09, Comment at 8-9 (Tentative Draft No. 10, 1960); id. § 1.13(2), Comment at 110-13 (Tentative Draft No. 4, 1955). But, as Justice White noted in Patterson v New York, 432 U.S. 197, 209, n.11, 53 L.Ed.2d 281, 291 (1977), that was an avowed policy choice by the Code's drafters:

> The drafters of the Model Penal Code would, as a matter of policy, place the burden of proving the nonexistence of most affirmative defenses ... on the prosecution. ... The drafters recognize the need for flexibility, however, and would, in "some exceptional situations", place the burden of persuasion on the accused.
>
> "Characteristically these are situations where the defense does not obtain at all under existing law and the Code seeks to introduce a

> mitigation. Resistance to the mitigation, based upon the prosecution's difficulty in obtaining evidence, ought to be lowered if the burden of persuasion is imposed on the defendant. Where that difficulty appears genuine and there is something to be said against allowing the defense at all, we consider it defensible to shift the burden in this way." ALI, Model Penal Code § 1.13, Comment p. 113 (Tent. Draft No. 4, 1955).

6

Review of what legislative history is available on Alaska's 1978 revision to its criminal code indicates that the choice to place the burden of persuasion on the defendant was deliberate and made after consideration of applicable constitutional restraints. Prior to the 1978 code revision, duress had not been codified as a defense in Alaska. It had been raised, at least in the trial courts. See Alaska Senate Journal, Supp. No. 47, at 137 (June 12, 1978), citing Evans v State, 550 P.2d 830, 841, n.31 (Alaska 1976), and State v Webb, No. 74-1734 (Super. Ct., 3rd Dist. 1974). The February, 1977 Tentative Draft of the Criminal Code indicated that "duress" was going to be designated as a principle of justification, but its content was not

yet defined. Alaska Criminal Code Revision, Tentative Draft, Part 2, p. 38 (1977). See B. Stern, "The Proposed Alaska Revised Criminal Code", 7 U.C.L.A. - Alaska L.Rev. 1, 25, n.137 (1977).

Certain principles of justification were ultimately designated as "defenses" and as such the persuasion burden was placed on the state beyond a reasonable doubt. AS 11.81.900(b)(15). Others, those denominated "affirmative defenses", required proof by a preponderance of the evidence from the defendant. AS 11.81.-900(b)(1). The commentary to the tentative draft explains:

> The code defines an affirmative defense as a defense that must be raised and established by the defendant by a preponderance of the evidence. There are 18 affirmative defenses in the Revised Code. The United States Supreme Court recently upheld the right of a state to require a defendant to prove certain defenses at trial. Patterson v N.Y., 97 S.Ct. 2319 (1977).

Alaska Criminal Code Revision, Tentative Draft, Part 5 at p. 9-10 (1978).

7

See also United States v Calfon, 607 F.2d 29. 30-31 (2nd Cir. 1979), cert denied 444 U.S. 1085, 62 L.Ed.2d 771 (1980). Several of the cases cited by petitioner hold only that in particular jurisdictions the burden is on the prosecution, without concluding that they are constitutionally constrained to do so. E.g., People v Field, 28 Mich. App. 476, 184 N.W.2d 551, 552 (1970); United States v Hearst, 563 F.2d 1331, 1336 (9th Cir. 1978). Other state, e.g., People v Aldridge, 383 N.E.2d 19 (Ill. App. 1978), and federal courts, e.g., United States v Mitchell, 725 F.2d 832, 836 (2nd Cir. 1983), see 1 Devitt & Blackmar, Federal Jury Practice and Instructions, §14.16 (3rd ed. 1977 and 1985 cumulative supplement); Manual of Model Jury Instructions for the Ninth Circuit, §6.04 (1985 ed.), are in accord. There are cases which hold that the burden of persuasion on duress may not, under their jurisdictions' particular statutes, be constitutionally placed on the defendant, e.g., State v Charlton, 338 N.W.2d 26, 29-30 (Minn. 1983).

In contrast, a number of jurisdictions have adopted the same position as has the Alaskan legislature, see State v Toscano, 74 N.J. 421, 378 A.2d 755, 766 (1977), several after considering, and rejecting, the constitutional challenge

made by petitioner in this case, Davis v McCotter, 766 F.2d 203 (5th Cir. 1985); Charles v State, 636 S.W.2d 5, 6-7 (Texas Ct. App. 1982); Foraker v State, 394 A.2d 208, 214 (Del. 1978); People v Bevilacqua, 56 A.D. 605, 391 N.Y.S.2d 641 (N.Y. 1977), rev'd on other grounds, 45 N.Y.2d 508, 410 N.Y.S.2d 549, 382 N.E.2d 1326 (1978); see Moes v State, 91 Wis.2d 756, 768, 284 N.W.2d 66 (1979); cf. Commonwealth v Robinson, 415 N.E.2d 805, 812-16 (Mass. 1981), and the authorities cited therein.

8

An accomplice is one who in some manner, knowingly and with criminal intent, aids, abets, assists or participates in a criminal act.

A person need not commit every element of the offense in order to be guilty as an accomplice. However, it is necessary that he in some way associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his actions to make it succeed. Prior knowledge that a crime as about to be committed and concealment of that knowledge alone do not make one criminally liable as an accomplice. Furthermore, once a crime has been committed, concealment of one's knowledge of the crime does

not make one an accomplice. Finally, mere presence at the scene of the crime is not in itself enough to make one an accomplice.

Complicity is established only if there is conduct voluntarily undertaken for the purpose of participating or assisting in the completion of a crime.

"Aid and abet" means to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or induce, counsel or incite as to its commission.

If you find beyond a reasonable doubt that Scott A. Walker either committed an offense or was an accomplice to an offense you should convict him of that offense.

If you do not believe beyond a reasonable doubt that he committed an offense or was an accomplice you should acquit him of that offense.

9

See, e.g., Ladner v United States, 385 U.S. 1679, 3 L.Ed.2d 199 (1958); Bell v United States, 349 U.S. 81, 99 L.Ed. 905 (1955), and United States v Universal C.I.T. Credit Corp., 344 U.S. 218,

97 L.Ed. 260 (1952), all of which reach their results on the basis of statutory interpretation rather than constitutionally mandated principle.

10

Where there is no intent to harm more than one person, Alaska deems it a violation of its state double jeopardy clause to impose consecutive punishments, Dunlop v State, 696 P.2d 687, 689-91 (Alaska App. 1985).